

NTSB Order No. EA-4903

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 26th day of July, 2001

Respondent .

OPINION AND ORDER

7359

Federal Aviation Regulations ("FARs"), but reducing sanction to a 60-day suspension of respondent's control tower operator (CTO) certificate.² We grant the Administrator's appeal, and deny respondent's appeal.³

The Administrator's Amended Emergency Order of Revocation (a copy of which is attached to this opinion) alleges that respondent lacks the requisite care, skill, and judgment required of a CTO certificate holder. The revocation order cites three incidents that occurred while respondent was performing his duties in the air traffic control tower at Eppley Airfield in Omaha, Nebraska: (1) on October 9, 1997, respondent contributed to a loss of required separation between an aircraft and a ground-based obstruction, (2) on May 23, 1998, respondent failed to ensure required separation between a departing and an arriving aircraft, and (3) on February 16, 2000, respondent failed to ensure required separation between a departing aircraft and a taxiing aircraft. According to the revocation order, after the

² FAR section 65.45(a), 14 C.F.R. Part 65, states:

Sec. 65.45 Performance of duties.

(a) An air traffic control tower operator shall perform his duties in accordance with the limitations on his certificate and the procedures and practices prescribed in air traffic control manuals of the FAA, to provide for the safe, orderly, and expeditious flow of air traffic.

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³ Respondent waived the expedited procedures applicable to an emergency order of revocation.

1997 incident (an operational error), respondent was given additional training, and was required to undergo two over-the-shoulder performance reviews. After the 1998 incident (also an operational error), the Administrator decertified respondent and he was required to undergo remedial training before later being re-certified as a controller. The gravamen of the revocation order is that, despite these remedial, administrative measures on the part of the Administrator, the February 16, 2000, incident demonstrates, in conjunction with respondent's past performance, a fundamental lack of qualification to exercise the duties and responsibilities of a CTO certificate holder.

At the hearing, the Administrator presented the testimony of five witnesses, and introduced eight exhibits. Respondent presented no witnesses, but introduced five exhibits. At the conclusion, the law judge found, on the basis of the February 16, 2000, incident, that the Administrator established a violation of FAR section 65.45(a). The law judge did not take the 1997 and 1998 operational errors into account because, he said, the Administrator contemporaneously exercised her judgment, after retraining respondent, that he was fit to continue performing his duties as a controller.⁴ After characterizing the February 16,

⁴ The Administrator's Amended Order of Revocation was plead in such a manner that the 1997, 1998 and 2000 incidents were both independently, and in the aggregate, a basis for a section 65.45(a) violation. Prior to the hearing, the law judge erroneously dismissed as stale the allegations pertaining to the 1997 and 1998 incidents because, he said, the Administrator did not "contemporaneously consider th[ose] events ... as raising an issue of lack of qualification." See 49 C.F.R. § 821.33(b). The
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2000, loss of separation as "fairly innocuous," the law judge modified the revocation order to a 60-day suspension of respondent's CTO certificate.⁵

On appeal, the Administrator argues that the February 16, 2000, incident, occurring, as it did, after respondent underwent additional training following two previous operational errors, indicates "a pattern of conduct that collectively presents an issue of lack of qualifications[,] " and argues that the law judge erred, therefore, in dismissing the allegations about the 1997 and 1998 operational errors as stale. The Administrator also argues that the law judge erred in modifying respondent's

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law judge's finding of a section 65.45(a) violation was, therefore, based solely on the February, 16, 2000, incident. Reinstating, as we do, the ultimate sanction of revocation, we decline to address whether, standing alone, the 1997, 1998 or 2000 incidents could be a basis for revocation. Nonetheless, it was still error for the law judge not to consider the administrative record of the 1997 and 1998 operational errors in assessing sanction after he found a violation of section 65.45(a). The issue is not whether respondent had an opportunity to litigate the events underlying the 1997 and 1998 incidents, but, rather, whether respondent now denies those operational errors. Because respondent does not, the record pertaining to those events is properly considered in any assessment of respondent's current qualification to hold a CTO certificate.

⁵ It is not clear from the law judge's decision how he calculated the 60-day suspension, aside from his stated belief that the February 16, 2000, incident was a "simple mistake[]" and his observation that a 30-day suspension would be the normal sanction in circumstances where a pilot (as opposed to a controller) was responsible for a first-time runway incursion. Considering respondent's role in the 1997 and 1998 incidents, his subsequent training, and the February 16, 2000, incident in the aggregate, we disagree with the law judge's characterization of the Administrator's case as merely about a simple or unavoidable human error.

sanction to a 60-day suspension. Respondent argues that the law judge erred in finding a violation of FAR section 65.45(a), and in calculating the 60-day suspension.⁶

We have no hesitation in upholding the law judge's finding that respondent violated FAR section 65.45(a). Notwithstanding respondent's complaint that the law judge's decision did not reference a specific provision in the Air Traffic Control ("ATC") Manual, the record contains ample evidence that respondent's actions on February 16, 2000, caused a runway incursion and, therefore, were not in accordance with the requirements and procedures specified therein.⁷ As we have already indicated,

⁶ Respondent also argues that the Administrator is barred from taking enforcement action against his CTO certificate because the Administrator has, in the past, chosen administrative action rather than enforcement action in response to controller errors. This argument has no merit, of course, nor can respondent claim he had no notice that the Administrator could seek enforcement action. See 49 U.S.C. § 44709. To the extent respondent believes the Administrator's prosecution runs contrary to agreements or understandings controllers have with the Administrator, resolution of such issues are for other fora. Similarly, respondent's argument that he did not receive adequate notice of the specific provisions of the ATC Manual that formed the basis for the Administrator's allegations regarding the February 16, 2000, incident is unavailing. It is of no moment that there was disagreement among the Administrator's witnesses as to whether paragraph 3-7-2 of the ATC Manual -- the only provision specifically referenced in the revocation order -- was controlling. It is clear from the record that respondent was familiar with the events at issue, and the revocation order sets forth in detail the factual and substantive basis for the Administrator's charge that his conduct on February 16, 2000, violated section 65.45(a).

⁷ We think it clear that references in Paragraph 3-1-5 of the ATC Manual to ground vehicles includes taxiing aircraft, but, in any event, and more to the point, respondent does not claim that procedures in the ATC Manual permit a controller to allow an aircraft to take off from a runway that another aircraft is
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however, we cannot uphold the law judge's modification of sanction. On this record, we see no basis not to defer to the Administrator's judgment that revocation is warranted.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is granted;
2. Respondent's appeal is denied;
3. The law judge's initial decision, to the extent it is inconsistent with this opinion and order, is reversed; and
4. The Administrator's Amended Order of Revocation, as to the revocation of respondent's CTO certificate, is affirmed.

CARMODY, Acting Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.

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taxiing across. To be sure, the Administrator established a prima facie case, and respondent, having elected not to present evidence at the hearing, cannot now on appeal expect to overturn that evidence, including the expressed judgment of experienced ATC managers who testified on behalf of the Administrator, by way of selective excerpts from the ATC Manual.